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Written statement* submitted by the Article 19 - The International Centre Against Censorship, a non-governmental organization on the roster

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[16 February 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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ARTICLE 19 calls for reforms to the Criminal Code of Kazakhstan to protect the rights to freedom of expression and peaceful assembly

ARTICLE 19 is concerned that the new Criminal Code of Kazakhstan, which entered into force on 1 January 2015 following a two-year reform process, significantly restricts the space for freedom of expression and freedom of peaceful assembly. The Criminal Code violates guarantees for these rights contained in the International Covenant on Civil and Political Rights (ICCPR), which Kazakhstan has ratified.

In particular, we call on the Government of Kazakhstan to:

- Repeal the criminal offence of "dissemination of knowingly false information" (Article 274);
- Repeal criminal defamation (Article 130);
- Repeal the criminal offence of "insult" (Article 131) and insult of the President and other public authorities (Articles, 373, 375, 376, 378);
- Amend the criminal offences of "incitement of social, national, ethnic, racial, class or religious hatred (Article 174) and related crimes (in particular, Article 183)
- Repeal the offence of "violation of the order of organization and conduction of assemblies, rallies, marches, pickets and demonstrations" (Article 400);
- Amend the law "on the organisation and conduction of peaceful assemblies, rallies, marches, pickets and demonstrations" to bring it in line with international standards.

Freedom of Expression

Dissemination of False Information: the new Criminal Code introduced Article 274, "knowingly disseminating false information that creates a risk of public disorder or substantial harm to the rights and legitimate interests of citizens or organisations or the legally protected interests of society or the state." The maximum punishment under this Article, if committed by an individual, is correctional labour or imprisonment for up to one year. However, if committed by a group of people, by a person using his office, or with the use of mass media or information communication networks, it is punishable by between two and five years of imprisonment or a fine.

The provision does not meet the requirement under international law that restrictions on freedom of expression be formulated with sufficient precision to be understandable, so that people can regulate their conduct accordingly. Article 274 does not explain what is meant by "knowingly false information" and does not differentiate facts and value judgments; it allows for subjective interpretation that is open to abuse to suppress legitimate expression that the authorities simply disagree with. Such broad restrictions are not necessary in a democratic society, and the available sanctions are severe and disproportionate considering that legitimate or relatively harmless speech could be punished under this provision.

Criminal Defamation: defamation is retained under Article 130 of the new Criminal Code as a "publicly dangerous" form of crime and may be punished by up to three years of imprisonment, a fine or correctional labour. Criminal sanctions for defamation, in particular where State authorities are able to initiate complaints, are open to abuse by those in power who seek to silence critical or dissenting voices. Custodial sentences of any length are not a necessary or proportionate punishment for defamation, as the civil law provides a less restrictive and more effective means to provide redress to victims for reputational harm.

Insult and sedition: the Criminal Code includes provisions on insult and several offences relating to sedition.

Article 131 of the Criminal Code prohibits insult, which is defined as "denigration of the honour and dignity of another person in an indecent manner." If committed publicly or with the use of mass media or information communication networks, insult may be punished by a fine of up to 200 monthly calculated indexes, or correctional labour or public works for a period of 180 hours.

Insult laws, to the extent that they seek to protect individuals' feelings or sensitivities rather than reputations, are not compatible with international standards on freedom of expression as there is no right to be free from offence. Such laws are often abused to silence criticism or dissent, in particular the expression of marginalised groups. These provisions may also be applied to protect abstract ideas or symbols from criticism, which is not compatible with international human rights law.[1]

Significantly harsher sentences are available where the person insulted is a state official, and the punishment available increases in proportion to the seniority of that official. Under Article 378, imprisonment of up to 175 days is available for public insult of a state official with the use of mass media or information communication networks. Under Article 373, up to five years of imprisonment is provided for "public insult or other encroachment on the honour and dignity" of the First President of Kazakhstan – Leader of the Nation (a title bestowed on the current President, Nursultan Nazarbayev, in 2010) or for prevention of his "legitimate activities". Similar punishment is provided in Article 375, which concerns insult in relation to the President generally, protecting future Presidents in anticipation of when Nazarbayev is no longer in office.

Articles 373, 375, and 378 fail to meet requirements of international law. As pointed out by the UN Human Rights Committee in General Comment No. 34: "laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned", and international mechanisms on freedom of expression "defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens."[2] The new Criminal Code reverses the principle that the more senior the public official, the greater the degree of criticism that they should tolerate. Even absent their application by a Court, the mere existence of the provisions in the criminal code will have a profound chilling effect on the freedom of expression.

Incitement to hatred: Article 174 of the Criminal Code makes it an offence to incite "social, national, ethnic, racial, class or religious hatred", and provides sentences of between 2 and 20 years. Article 183 essentially prohibits the same offence when committed through mass media.

The offence goes far beyond the obligations of States under Article 20(2) of the ICCPR to prohibit any advocacy of racial, national or religious hatred that constitutes incitement to violence, hostility or discrimination. It includes, for example, actions that "demean national honour and dignity or religious feelings of citizens", thus permitting restrictions on expression that may include legitimate criticism of the State or of religions. The categories of individuals protected include grounds not recognised under international law, including "social class" and "class" generally; these provisions have been used in Kazakhstan to protect the ruling classes and elite business owners from criticism. Further, the offence prohibits incitement of hatred, rather than incitement to harmful acts, such as violence, hostility or discrimination, thus allowing for broad interpretation. Thus, rather than protect marginalised groups from harm, it is likely that this provision will be abused to punish minority and dissenting voices while protecting those in power from criticism.

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[1] UN Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, 12 September 2011, at para. 48.

[2] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 30 November 2000, available at: http://www.article19.org/data/files/pdfs/igo-documents/three-mandates-dec-2000.pdf. See also: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/20/17, 4 June 2012, at para. 88; European Court of Human Rights (ECtHR), *Lingens v. Austria*, 24 June 1986, Application No. 9815/82, at para. 42.

In view of the inconsistency of Articles 130, 131, 174, 183, 274, 373, 375, 376, 378 of the Criminal Code with Kazakhstan's obligations under the ICCPR, ARTICLE 19 calls on the government to repeal them in their entirety.

Freedom of Peaceful Assembly

The new Criminal Code contains provisions significantly restricting the right to the freedom of peaceful assembly.

Article 400 of the Criminal Code introduces a new concept of "an illegal public event", in addition to the concept of an "an illegal assembly, rally, march, picket, demonstration". All these activities, if illegal, may be punished by a fine in the amount of 300 monthly calculated indexes, correctional labour, public work or imprisonment of up to 75 days.

The law "on the organization and conduction of peaceful assemblies, rallies, marches, pickets and demonstrations in the Republic of Kazakhstan" (the Peaceful Assembly Law) outlines the circumstances under which local executive bodies can determine an event to be illegal and request its termination.

The Peaceful Assembly Law establishes a regime of prior authorisation for conducting assemblies, as opposed to a system of notification. Article 8 provides that an assembly that is not authorised can be terminated. This is against international standards on the right to freedom of peaceful assembly.

The Peaceful Assembly Law also grants unlimited powers to local executive bodies to decide on the time and place of assemblies. Article 4 stipulates that an assembly must be terminated where participants do not comply with the time and place conditions that the authorities have imposed.

ARTICLE 19 calls on the government to remove Article 400 from the Criminal Code as it is inconsistent with the ICCPR, and to reform the Peaceful Assembly Law in order to bring it in line with international standards.